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Attorneys for defendant Tanya Andersen
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8 UNITED STATES DISTRICT COURT
DISTRICT OF OREGON AT PORTLAND
9

Atlantic Recording Corporation, a)
10 Delaware corporation; Priority Records,)
LLC, a California limited liability)
11 company; Capitol Records, Inc., a)
Delaware corporation; UMG Recordings,)
12 Inc., a Delaware corporation; and BMG)
13 Music, a New York general partnership,)

14 Plaintiffs,)

15 v.)

16 Tanya Andersen,)
17)

18 Defendant.)
19

No. CV 05-933 AS

Declaration of Lory R. Lybeck in
Support of Tanya Andersen's Motion
to Fix Amount of Attorney's Fees
and Costs

20 I, Lory R. Lybeck, declare and certify as follows:

21 1. I represent defendant Tanya Andersen and I have personal knowledge of the facts
22 contained in this declaration.

23 2. On September 21, 2007, U.S. Magistrate Judge Donald C. Ashmanskas issued
24 Findings and Recommendations which recommended that attorney's fees be awarded in favor of
25 Ms. Andersen. A true and correct copy of Judge Ashmanskas' Findings and Recommendations
26 are attached hereto as Exhibit A.

1 3. On January 16, 2008, Senior U.S. District Judge Redden adopted Judge
2 Ashmanskas' Findings and Recommendation and granted Ms. Andersen's motion for attorney's
3 fees. A true and correct copy of Judge Redden's Opinion and Order is attached hereto as Exhibit
4 B.

5
6 4. I am a partner in the law firm of Lybeck Murphy, LLP, and have been a member
7 in good standing of the Oregon State Bar Association since 1983. I received my law degree from
8 Willamette University School of Law in 1983. I was formerly a partner in Schwabe Williamson
9 & Wyatt; Cable Huston, et al., and Hoffman Hart & Wagner. In 2000 my partner James Murphy
10 and I formed Lybeck Murphy, LLP.

11 5 James Murphy has been a member in good standing of the Washington State Bar
12 Association since 1988. He is also a member in good standing of the Oregon State Bar
13 Association. He graduated *magna cum laude* from Gonzaga University School of Law in 1988.
14 Prior to entering private practice, Mr. Murphy served a two-year appellate clerkship at the
15 Washington State Court of Appeals. Mr. Murphy worked at Schwabe Williamson & Wyatt as an
16 associate, and later joined the firm Hoffman Hart & Wagner where he became a partner.

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18 6. The defense of Ms. Andersen against the copyright infringement claims of
19 plaintiffs required a significant amount of attorney resources, and several associates assisted and
20 worked under my supervision. The following Lybeck Murphy associates assisted with this
21 matter. Brian C. Armstrong and Brian T. Hodges each graduated with honors from the Seattle
22 University School of Law (then known as University of Puget Sound School of Law). Mr.
23 Armstrong and Mr. Hodges each began practice in 2001 and served clerkships with the
24 Washington State Court of Appeals. Katherine L. Felton graduated with honors from the
25 University of Oregon School of Law and began practicing in 2000. Benjamin R. Justus
26

1 graduated from The George Washington University Law School, and began practicing in 2004.

2 Each of these associates has a broad range of civil litigation experience.

3 7. I have collected and reviewed my firm's time records for the work performed on
4 behalf of Ms. Andersen in defending against the copyright claims brought by plaintiffs.

5 8. My firm keeps written time records that are created contemporaneously as the
6 work is performed and then entered into a computer software program. Attached to this
7 declaration as Exhibit C is a true and correct copy of my firm's computer time records detailing
8 work performed my firm on this case since September 14, 2005. These records list time spent by
9 attorneys and staff (in tenth of an hour increments) and the specific tasks performed by each
10 person.
11

12 9. The computer records of the time spent by lawyers and paralegals working on this
13 case contain detailed explanations of the actual tasks performed on behalf of the clients, and
14 therefore, necessarily contain privileged information. I am producing these time records without
15 waiving the attorney-client or attorney work product privileges.
16

17 10. In addition to the time set forth in the attached computer time records, I spent 1.5
18 hours preparing the motion for fees and costs and supporting documents. My associate Benjamin
19 Justus spent an additional 4 hours in preparing the motion and supporting documents. The
20 following is a summary of the time spent by each timekeeper on this matter since September 14,
21 2005 as set forth in the time records:
22

Lory R. Lybeck (partner)	105.7 hours
James P. Murphy (partner)	23.2 hours
Brian C. Armstrong (associate)	10 hours
Brian T. Hodges (associate)	137.2 hours
Katherine L. Felton (associate)	1.1 hours
Benjamin R. Justus (associate)	236.3 hours

R. Lynne Jardine (paralegal)	3 hours
Loren Van DeMortel (paralegal)	0.2 hours
Elizabeth J. Curtis (paralegal)	19.6 hours
Bryan Case (paralegal)	10.6 hours
Total Partner Time:	128.9 hours
Total Associate Time:	384.6 hours
Total Paralegal Time:	33.4 hours

11. All of the time spent by myself and other lawyers and paralegals on this case was reasonable and necessary in order to properly defend Ms. Andersen against the claims made by plaintiffs. This case was pending for well over two years before the claims against Ms. Andersen were dismissed with prejudice. As Judge Ashmanskas noted in his Findings and Recommendations, throughout the pendency of this action plaintiffs “unreasonably rejected or sought to suppress evidence to the extent it tended to exonerate defendant” and “exerted a significant amount of control over the course of discovery”. See Ex. A, at 11, 13. The discovery included multiple unnecessary depositions, all of which were insisted upon by plaintiffs with the intent to harass and intimidate Ms. Andersen. The case did not end until Ms. Andersen was able to file a motion for summary judgment and plaintiffs abandoned their claims hours before their opposition to the motion was due.

12. The court may use the Oregon State Bar Economic Survey (“the Survey”) as an initial benchmark in setting reasonable hourly rates for attorney’s fee petitions pursuant to Local Rule 54.3. Higher rates than those provided by the Survey are typically appropriate based on inflation, specialty or other factors so long as the parties address the Survey and provide justification for requested hourly rates.

1 13. The most recent edition of the Survey is from 2002 and is outdated. The Survey
 2 reported an overall average hourly billing rate of \$174 per hour. For attorneys who had been
 3 admitted to practice for 21-30 years, the overall average rate was \$193 per hour. For attorneys
 4 who had been admitted to practice for 4-6 years, the overall average rate was \$152 per hour.

5 14. These overall rates reported in the Survey were based on data from attorneys
 6 working in all geographic areas of the state, and several practice areas. The Survey also reported
 7 further data that were refined for geographic location, practice areas, and experience. For
 8 example, even 6 years ago, the average rate for attorneys working in Portland who had been
 9 admitted to practice for 21-30 years was \$227 per hour; Portland attorneys who had practiced 4-6
 10 years charged an average of \$165 per hour.

11 15. Rates in excess of those provided by the Survey are clearly warranted in this case.
 12 According to calculations provided by the Department of Labor's Bureau of Labor Statistics, \$1
 13 in 2002 has the same buying power as \$1.17 today, reflecting an inflation rate of 17% since 2002.
 14 In a recent Opinion and Order from U.S. Magistrate Judge Dennis J. Hubel in response to a
 15 motion for an award of fees, he recognized that awardable hourly rates should exceed those rates
 16 shown in the Survey to account for inflation. See October 10, 2007 Order of U.S. District Judge
 17 U.S. Magistrate Judge Dennis J. Hubel entered in Relion, Inc. v. Hydra Fuel Cell Corp., No. CV-
 18 06-607-HU (D. Ore. Oct. 10, 2007).

19 16. Further, this court has also previously recognized that the Survey "includes hourly
 20 rates for attorneys who are part-time due to lack of legal work...result[ing] in an underestimation
 21 of the prevailing market rate for skilled full-time attorneys with good reputations." See March 8,
 22 2006 Order of U.S. District Judge Ann Aiken entered in Miranda v. City of Cornelius, No. CV-
 23 04-241-AA (D. Ore. March 8, 2006).

1 17. Also, the Survey does not show hourly rates for attorneys practicing in the area of
 2 copyright litigation, a unique and complex area of the law in which practitioners often charge
 3 higher hourly rates. For example according to a July 18, 2007 declaration of Richard Gabriel filed
 4 in Elektra Entertainment Group v. Santangelo, No. 06-CV-11520 (S.D.N.Y), Mr. Gabriel charged
 5 \$375 per hour in that case, a very similar copyright matter pending in the Southern District of
 6 New York. Another lawyer from Mr. Gabriel's firm charged \$345 per hour in the same matter;
 7 one paralegal from Mr. Gabriel's firm charged \$150 per hour and another charged \$140 per hour.
 8 Mr. Gabriel and his firm are also counsel for plaintiffs in this matter. A true and correct of Mr.
 9 Gabriel's declaration is attached hereto as Exhibit D.

11 18. In light of the above, I respectfully request that this court enter an award reflecting
 12 reasonable hourly rates of \$375 for partners, \$250 for associates, and \$150 for paralegals. As Mr.
 13 Gabriel's declaration establishes, these rates reflect the rates that private attorneys of comparable
 14 ability and reputation charge their paying clients for legal work of similar complexity to that
 15 which was performed by Ms. Andersen's counsel in this matter.

17 19. Oregon courts have awarded a multiplier under certain circumstances. As
 18 discussed in greater detail in the memorandum supporting the motion for fees, the risk involved in
 19 pursuing the defense of this difficult and complex matter together with the unreasonable conduct
 20 and "bad faith" of plaintiffs in their handling of the case warrant a multiplier of 2 times the stated
 21 hourly rates. I respectfully request that this court apply a multiplier of 2.

23 20. Multiplying the rates by the necessary time incurred as set forth above, together
 24 with a multiplier of 2, results in the following total fees:

25	Total Partner Time:	128.9 hours x \$375/hour	x 2 = \$96,675.00
26	Total Associate Time:	384.6 hours x \$250/hour	x 2 = \$192,300.00

1 Dated at Mercer Island, Washington, this 24 day of January, 2008.

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3 By: 

4 Lory R. Lybeck (OSB #83276)
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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

I hereby certify that on the 24th day of January, 2008, I electronically filed the foregoing Declaration of Lory R. Lybeck in Support of Tanya Andersen's Motion to Fix Amount of Attorney's Fees and Costs with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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All parties are registered as CM/ECF participants for electronic notification.

DATED at Mercer Island, Washington, this 24th day of January, 2008.

By: /s/ Benjamin R. Justus
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